



Truckee Meadows Storm Water Permit Coordinating Committee

City of Reno

E. Terri Svetich, P.E., Program Coordinator
Kyle West, P.E.

City of Sparks

Toby Ebens
John Martini, P.E.

Washoe County

Walter West, P.E.
John Buzzone, P.E.

June 24, 2011

Ms. Donna Downing
Office of Water (4502-T)
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Avenue, NW
Washington DC 20460
CWAwaters@epa.gov

Attention: Docket ID No. EPA-HQ-OW-2011-0409

Thank you for the opportunity to provide comments relative to proposed guidance that describes how the Army Corps of Engineers and United States Environmental Protection Agency (jointly, the Agencies) will identify waters protected by the Clean Water Act and implement the Supreme Court's decisions on this topic. These comments are being submitted on behalf of the Truckee Meadows Storm Water Permit Coordinating Committee (TMSWPCC). TMSWPCC is comprised of representatives from the Cities of Reno and Sparks and Washoe County in Nevada, and is responsible for managing storm water quality management and watershed protection under a regional Phase 1 National Pollutant Discharge Elimination System (NPDES) permit.

It is the position of the TMSWPCC that the Clean Water Act (CWA) limits federal jurisdiction to "navigable" waters of the United States, as reaffirmed by the United States Supreme Court (2001, 2007). The two Supreme Court decisions (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers and Rapanos v. United States) have reaffirmed that "navigable waters" under the CWA does not extend to all waters. The TMSWPCC opposes any proposal to fundamentally change this definition set by the CWA, in expanding jurisdiction of the federal government over waters to include intrastate waters as groundwater, ditches, culverts, pipes, desert washes, sheet flow, erosional features, farm and stock ponds and prior converted cropland. The Supreme Court decisions referenced, reaffirmed that "navigable waters" under the CWA does not extend to all waters. This proposed Guidance will affect all CWA programs, including Section 404 discharges of dredged or fill material, Section 402 NPDES permits, Section 401 state water quality certifications, and Section 303 water quality standards and total maximum daily loads.

The broad application of the Proposed Guidance makes it very likely that it will have a substantial impact on the TMSWPCC agencies and day to day business activities. This implication alone warrants an extension of the comment period.

A substantial body of case law suggests that when an agency significantly changes its interpretation of an existing policy, the agency must do so after engaging in formal notice and comment

rulemaking. See, e.g., *Paralyzed Veterans of American v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). In *Crop Life America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003), the D.C. Circuit Court of Appeals held that a document containing “clear and unequivocal language, which reflects an obvious change in established agency practice,” is subject to notice and comment rulemaking requirements under the Administrative Procedure Act. Similarly, in *Alaska Professional Hunters Ass’n, Inc. v. Federal Aviation Administration*, 117 F.3d 1030 (D.C. Cir. 1990), the court stated that:

When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94-95 (C.C. Cir. 1997), is to the same effect: a modification of an interpretive rule construing an agency’s substantive regulation will, we said, “likely require a notice and comment procedure.”

The Agencies claim that the Guidance is needed to improve CWA program predictability and clarity, but in reality, the Guidance reduces clarity and creates uncertainty by expanding jurisdiction beyond the intent of the CWA and views expressed in Supreme Court decisions. In fact, USEPA and USACE have chosen to selectively interpret the Supreme Court decisions related to the jurisdictional authority of the CWA in order to develop the Draft Guidance to expand their jurisdictional authority.

The Agencies have stated that they intend to issue final guidance and then potentially embark upon a rulemaking. The TMSWPCC disagrees with this approach, and believes it violates the Administrative Procedure Act (APA). By issuing Guidance instead of initiating formal rulemaking, the Agencies are circumventing the requirements set forth in the Administrative Procedures Act, signed into law in 1946 to provide legislative and judicial oversight of executive agencies.

Regardless, the agencies have made it clear that once finalized, the guidance will be applied in the field. This makes it imperative that the TMSWPCC, and other stakeholders, has sufficient time to thoroughly review and comment on the Proposed Guidance.

An extension of the comment period is warranted in light of the many legal and economic considerations implicated by the proposal, and the volume of information presented in supporting documents. Additional time is needed for stakeholders to review and evaluate these supporting documents which raise complicated analyses. Indeed, EPA itself has estimated that the annual costs of implementing the Guidance will be \$87 million to \$171 million. This estimate was arrived at by the EPA without considering permitting costs, the increased delays for expanded federal jurisdiction, and the costs of new land use restrictions.

Thank you for considering our comments.

Sincerely,



E. Terri Svetich, P.E.

Truckee Meadows Storm Water Quality Management Program Coordinator